No. 18,263

IN THE

United States Court of Appeals

For the Ninth Circuit

STATE BOX COMPANY, a California Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California, Northern Division

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment entered on the 8th day of August, 1962 by the United States District Court for the Northern District of California, Northern Division, quieting the title of the United States to standing timber in Nevada County, California. (R. 91).

The District Court's jurisdiction was invoked under 28 U.S.C. 1345. (R. 1).

This Court's jurisdiction rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is a suit brought by the United States to quiet title to timber now standing and to enjoin appellant from making any claim to the proceeds of a sale of timber already sold by the United States.

Pursuant to Section 3 of the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, the United States granted every odd numbered section of land within twenty miles of the railroad to The Central Pacific Railroad Company of California. The Act excepted mineral lands from its operation, but as to mineral lands within 10 miles the timber thereon was granted to the railroad company. The land upon which the timber here involved is standing is located in Section 15, Township 18 North, Range 11 East. M.D.B. & M. (R. 79). This section is within ten miles of the railroad.

In the year 1925 this land was, for the first time, conclusively established to be mineral in character. (R. 80). As a result of this determination it became established that the original grant to the railroad company pertained only to the timber on Section 15 and fee title to the land, therefore, at all times remained in the United States. (R. 80).

Through mesne conveyances the timber on Section 15 passed from the railroad to appellant's predecessor, The Central Mill Company, a corporation (R. 81). The appellant, State Box Company, was the sole shareholder of The Central Mill Company, and upon its dissolution in 1944 appellant acquired all of its property. (R.82).

In November, 1954, the United States, acting through the Forest Service, sold a portion of the timber on Section 15 to Grizzly Creek Lumber Company. In 1955 some of this timber was cut on a selective basis and the United States was paid the sum of Eighty-six Thousand Two Hundred Fifty-four Dollars and Thirteen Cents ($86,254.13) by the purchaser. (R. 83).

Following the sale and cutting of some of the timber, the appellant instituted three lawsuits as follows:

(a) A suit against the purchasers for conversion of the timber. This action is pending in the Superior Court of the State of California in and for the County of Nevada. (R. 86).

(b) A suit against the United States to recover the value of the timber cut. This action is pending in the United States Court of Claims. (R. 86).

(c) A suit against the Secretary of Agriculture of the United States to quiet title to the timber remaining. This action is pending in the United States District Court for the District of Columbia. (R. 86).

After these three lawsuits were instituted, the Government filed this suit in the District Court to quiet its title to the remaining timber and to restrain the Appellant from asserting any claim concerning the timber removed in 1955. As the result of the Government's institution of this action, the three lawsuits previously mentioned have been held in abeyance.

In the District Court the appellant asked that its title to the timber on Section 15 be quieted and that

the Court declare that Appellant was the owner of the timber removed in 1955 and further that the Court award a money judgment for the value of the timber so removed.

On August 8, 1962 the District Court held that The Central Pacific Railroad Company and its successors were required to remove the timber within a reasonable time after 1862 and further that a reasonable time had elapsed and as a consequence all title to the timber had been lost prior to 1955. The District Court entered its Judgment quieting title in the United States and declaring that the United States was the owner of the timber which was removed in 1955, and the Court enjoined the appellant from asserting any interest in the remaining timber or in the proceeds of the 1954 sale against either the United States or its contract vendees.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in holding that the grantee of the timber was required to remove the timber within a reasonable time.

2. The District Court erred in holding that Appellant had forfeited its title by failing to remove the timber within a reasonable time.

3. The District Court erred in holding that the rights which attach to this grant of timber in 1862 are to be determined by reference to Federal Law rather than by reference to the law of the state in which the timber is growing.

4. The District Court erred in holding that Appellant is estopped to claim title to the timber.

QUESTIONS PRESENTED

1. Whether, under the Act of 1882, The Central Pacific Railroad Company acquired a perpetual estate in the timber.

2. Whether, assuming The Central Pacific Railroad Company did not acquire a perpetual estate in the timber, the failure to remove the timber within a reasonable time would cause a forfeiture of all rights in the timber.

3. Whether Federal Law rather than California Law governs the rights which attach to the grant of timber under the Pacific Railroad Act.

4. Whether the appellant is estopped to claim the timber.

SUMMARY OF ARGUMENT

This timber was granted by the United States to The Central Pacific Railroad Company in 1862 as a subsidy for the purpose of inducing private capital to construct a trans-continental railroad during wartime. All of the available historical evidence indicates that Congress intended to provide the railroad with a source of funds and credit and to grant a saleable commodity, to wit, a perpetual estate in all of the property granted.

The Congressional grant on its face was not subject to any limitations or conditions, and under these circumstances the grantee acquired a perpetual estate in the timber.

Even if the grant is construed as requiring removal of the timber within a reasonable time, in the absence of any evidence of an intention of Congress to the contrary, the legal effect to be given the failure to remove is to be determined by the settled law of California.

Under California law no forfeiture of title results from a failure to remove timber within a reasonable time. The Court will fix a time within which the timber owner may remove it and will by its Decree provide that upon a failure to remove within that time the landowner may himself remove the timber, sell it, and pay the net proceeds of sale to the timber owner. *Gibbs v. Peterson* (1912), 163 Cal. 758, 127 Pac. 62.

I. THE CONGRESSIONAL GRANT CONVEYED A PERPETUAL ESTATE IN THE TIMBER.

It is settled that a reservation or sale of timber may be so made as to pass to the purchaser or reserve to the grantor a perpetual right to have the timber remain on the land or a perpetual right to enter and remove it. 34 Am. Jur. 506. *Wilson Lumber Co. v. D. W. Alderman Sons Co.* (1908), 80 S. C. 106, 61 S. E. 217.

Where a deed is silent as to time of removal and no intention to sever is indicated by the terms of the contract, the situation of the parties, or the circum-

stances surrounding the execution of the contract, the grantee's rights are unaffected by failure to remove within a reasonable time. 34 Am. Jur. 507; *Hicks v. Phillips* (1912), 146 Ky. 305, 142 S.W. 394.

The question whether a deed of standing timber conveys a perpetual estate is fully annotated in 15 ALR 41, 31 ALR 944, 42 ALR 641, 71 ALR 143 and 164 ALR 423.

At the outset, the two most important considerations so far as the instant case is concerned are, first, that the Act of 1862 simply uses the word "grant" and makes no reference whatever to removal of the timber under any circumstances; and second that there is nothing indicated by the terms of the Act or by the situation of the parties or the circumstances surrounding the grant indicating that removal of the timber was contemplated.

The issue thus becomes more narrowly defined. If the conveyance uses the word "grant" and no others and there is no indication that the parties contemplated removal of the timber, what is the effect of the conveyance?

It is true that there are cases both ways; however, upon this narrow issue the majority of Courts actually hold that the grant creates a perpetual estate.

This is the rule in the following cases:

Wilson Lumber Co. v. D. W. Alderman Sons Co. (1908) 80 S.C. 106 S.E. 217; *Hicks v. Phillips* (1912) 146 Ky. 305, 142 S.W. 394; *Johnson v. King Lumber Co.* (1929) 39 Ga. App. 280, 147 S.E. 142; *Parks v.*

Anaconda Copper Mining Co. (1924) 69 Mont. 354, 222 Pac. 419; *Butterfield Lumber Co. v. Guy* (1908) 92 Miss. 361, 46 So. 78; *R. M. Gobban Realty Co. v. Donlan* (1915) 51 Mont. 58, 149 Pac. 484; *Lodwick Lumber Co. v. Taylor* (1906) 100 Texas 270, 98 S.W. 238; *Shenandoah Land and Anthracite Coal Co. v. Clark* (1906) 106 Va., 155 S.E. 561; *Bardon v. O'Brien* (1909) 140 Wis. 191, 120 N.W. 827; *Gabbard v. Sheffield* (1918) 179 Ky. 442, 200 S.W. 940; *Walters v. Sheffield* (1918) 75 Fla. 505, 78 So. 539; *Wait v. Baldwin* (1886) 60 Mich. 622, 27 N.W. 697; *Goodwin v. Hubbard* (1860) 47 Me. 596; *Crane v. Hoefling* (1942) 56 Cal. App. 2d 396, 132 Pac. 882; *Sears v. Ackermann.* (1903) 138 Cal. 583, 72 Pac. 171.

It is admittedly held in some cases that the timber must be removed within a reasonable time.

But in many of these cases the land is valuable for agricultural purposes, and the Courts rely upon this fact. Or in some cases the conveyance itself contains some reference to removal of the timber. Or there may be something in the circumstances of the parties indicating the parties contemplated removal. None of these factors applies to the Congressional Grant.

Clearly, the construction of the grant demands a determination of the intention of Congress when it said "the timber thereon is hereby granted to said Company." And it is Congress' intention in the year 1862 (not 1962) which is controlling.

The Supreme Court of the United States has spoken with reference to the bountiful Congressional policy

in *U. S. v. Union Pac. R. Co.* 91 U. S. 72, 79, 23 L. Ed. 224, 228:

> "Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions . . . It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies . . . Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transporta-

tion of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable."

Admitting that generally speaking grants by the United States must be construed favorably to the Government, nevertheless

"a general law offering grants and valuable privileges to corporations or individuals as an inducement to the construction of railroads or other works of a quasi-public character through a great, undeveloped public domain, should not be construed with the strictness of a merely private grant, but should receive a more liberal construction in favor of the purposes for which it was enacted."

73 C. J. S. 695;

U. S. v. Denver etc. R. Co. 150 U. S. 1, 15, 37 L. Ed. 970, 980.

Even if the grant were to be construed strictly, there is nothing in the language of the Congressional grant, or in the character of the land upon which this timber was situated, or in the Congressional journals of the time, or in the general historical circumstances, which would justify reading into the grant any intention upon the part of Congress that it should be limited in any way.

Congress was making an outright grant of public lands in perpetuity and also an outright grant of timber in perpetuity. The railroad was to be privileged to cut not only the timber it needed for construction purposes, but it was to receive as a reward for its enterprise thousands of acres of land which it could patent and sell to settlers, thus building up a profitable Western empire. The timber on those lands, where it existed, would be of vital importance to the railroad for sale in the future development of the communities of the West. To say that Congress intended that the railroad must clear the timber from the mineral lands within ten years or twenty years or fifty years or one hundred years would be to contradict the very purposes of the grant.

Equally important with legal precedents, perhaps more so, are some factual and historical considerations which bear upon the intention of Congress in 1862:

1. There is a striking and important difference between the Pacific Railroad Act and subsequent railroad acts with respect to excluded mineral lands. The Act of July 2, 1864, 13 Stat. 365 Section 3, enacted the same day as the amendment to the Pacific Railroad Act and which granted lands to the Northern Pacific Railway Co., and the Act of 1866, 14 Stat. 292, (Section 3) exclude mineral lands from the grant but provide that in lieu thereof "a like quantity of unoccupied and unappropriated agricultural land" is granted. There is no such provision in the Pacific Railroad Act. Instead of "in lieu" agricultural land, the railroad is granted the timber on the excluded

mineral land. The conclusion is inescapable that the 38th Congress intended to grant a perpetual fee interest in the timber.

2. The "mineral lands" were of potential value for only two purposes, either the extraction of minerals, or the timber itself. This timber has been described as "hardly excelled in the North American continent"[1] and as "some of it being the finest timber in the state."[2] Immediately following the construction of the railroad, although agricultural land was offered for sale at $2.50 per acre and oak wood land at $5.00 per acre, the pine timber land was priced at $10.00 per acre.[3]

3. The Act itself is most revealing. The government argued in this case that the congressional grant conveyed only such timber as might reasonably be required by the railroad for the purpose of building the road itself. Portions of the memorandum of the District Judge (R. 55) indicated that the Court was persuaded by this argument. Section 2 of the Act gives to the Railroad a right of way and also the right to take earth, stone, timber and other materials from adjacent public land for the purpose of constructing the railroad. Section 3, of course, granting the timber on the mineral lands would be superfluous if it was to grant only the right to take such timber as would be

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[1]Railroad Pamphlets, Volume 4, Pamphlet No. 15, California State Library.

[2]Clark, Leland Stanford, page 200.

[3]Railroad Pamphlets, supra.

required for building the road. This argument is also negated by the fact that the railroad sold thousands of acres of the timber to private parties without any objection from the government.

4. It must also be remembered that the Act was interpreted to provide for an administrative determination of the mineral character of the land (*Burke v. S. P. R.R.* 234 U. S. 669, 58 L. Ed. 1527) and with respect to Section 15, the mineral character of the land was not established until 1925, 63 years after the grant. Under these circumstances it is not realistic to attribute to Congress an intention that the timber on Section 15 be removed within a reasonable time after 1862.

5. Finally, the actual numerical majority of cases which had been decided at this date held that a grant of timber was to be construed as creating a perpetual estate.

The key to the intention of Congress in granting the timber is really found in its exception of the mineral lands. The only logical assumption which can be made is that Congress, in excepting the mineral lands from the grant, did so to reserve the same for locators of mineral claims. Sec. 4 of the Act of 1864 fortifies this assumption. It provides that the grant shall not include any timber necessary to support the improvements made by a miner but it does not disturb the primary grant. Inasmuch as the purposes of these locators in extracting minerals could be served just as well whether the owner of the timber removed it or

left it standing, there is no reason to suppose Congress intended to reserve any interest in the timber for the benefit of mineral claimants, other than that provided for by Sec. 4. Congress' policy in excepting the mineral lands would not in any way be interfered with by construing the grant as it reads, namely, an outright grant. Permitting the timber to remain upon the land would have no effect whatever upon its use for mineral exploration.

Research has disclosed only one case construing a separation of the timber from the land where the land was to be used for mineral purposes. In *Shenandoah Land and Anthracite Coal Co. v. Clark* (1960) 106 Va. 100, 55 S. E. 561, a conveyance reserved the timber on rough and mountainous land which was acquired by the grantee for the purpose of exploring for minerals. The Court held that the reservation of the timber was a perpetual one and the timber owner was not required to remove the timber within a reasonable time.

Once again, so far as research discloses, the Congressional grant of 1862, as it concerns the timber, has been construed in only one reported case. *Carr v. The Central Pacific Railroad,* (1880) 55 Cal. 192, held that the railroad had good title to the timber as against the claims of a subsequent mineral patentee. In that case the Court says:

> "The words of the grant are very broad. We all think this Judgment will have to be affirmed. The language seems to be about as broad as it can be: That 'The timber thereon is hereby granted'."

We have always felt that no lawyer, searching for the means with which to convey a perpetual estate in timber could come upon a stronger word than "grant".

We believe Mr. Justice Frankfurter describes the situation precisely in his dissenting opinion in *United States v. Union Pacific Railroad Company,* 353 U. S. 112, 137 1 L. Ed. 2d 224, 228:

> "The Court cannot in 1957 retrieve what Congress granted in 1862. The hindsight that reveals the act as lavish or even profligate ought not to influence the Court to narrow the scope of the 1862 grant by reading it in the light of a policy that did not mature until half a century thereafter. As the Court said in a very early construction of the act before us: 'No argument can be drawn from the wisdom that comes after the fact.'"

II. FAILURE TO REMOVE WITHIN A REASONABLE TIME DOES NOT RESULT IN A FORFEITURE OF TITLE.

The question involved upon this appeal has been previously litigated. In 1949 an action was instituted in the United States District Court for the Northern District of California, Northern Division, entitled *United States v. Waldron,* No. 6105, in which the United States sought to quiet its title to timber located in Section 21, which is located but a short distance from Section 15 and from the standpoint of the source of title, namely, the Act of Congress of 1862,

is identical with the timber involved in this case. The District Court in this case took judicial notice of the *Waldron* decision. (R. 85).

There is set forth in Appendix "A" of this Brief a copy of those portions of the record in the *Waldron* case which express the findings and judgment of the Court in that action.

This record reveals that then United States District Judge Dal M. Lemmon relied upon the rule in the case of *Gibbs v. Peterson,* (1912) 163 Cal. 758, 127 Pac. 62, in his original order. In his Interlocutory Decree Judge Lemmon allowed the defendants a period of approximately one additional year within which to remove the timber, decreed that if the defendants did not remove it within that time the United States was authorized to remove and sell it at the expense of and for the benefit of the defendants, and account to the defendants for the net proceeds. Judge Lemmon's decree further provided that if the timber was not removed within the specified period the United States would then be entitled to retain from the proceeds of the ultimate sale of the timber such amount as would reasonably compensate it for the use and occupancy of the land from the date of the expiration of the specified period up until the time of the actual removal of the timber.

Thereafter the parties stipulated to the making and entering of an amended interlocutory decree giving to the defendant approximately two years within which to remove the timber but limiting them to timber at least 22 inches in diameter (which was found

to be the size of timber which had been growing upon the land in 1862).

The law applied in the *Waldron* case is the settled law of California as indicated by Judge Lemmon. This general rule has been consistently followed in such later cases as: *Anderson v. Palladine* (1918) 39 Cal. App. 256, 178 Pac. 553; *Crane v. Hoefling* (1942) 56 Cal. App. 2d 396, 132 Pac. 2d 882.

Furthermore, as these cases hold, even when the grant shows that the parties contemplated that the timber should be removed within some specific time, the rule in California is that a forfeiture will not result from a failure to remove the timber. The California rule is an equitable one, avoiding a forfeiture and protecting the rights of all parties.

III. THE COURT SHOULD BE GUIDED BY CALIFORNIA LAW.

The District Court held the construction of the Congressional grant ". . . is a Federal not a State question." (R. 54). Although recognizing that the settled law of California would if applied to this case, prevent a forfeiture of appellant's title (R.60), the Court refused to apply California law.

By reason of the sanctity accorded real property titles, the usual rule resolves questions as to the legal effect of a grant by the law of the State in which the real property is situated. Any departure from this rule has the effect of rendering uncertain long established titles to real property.

Timber is no different than any other real property. With respect to the identical question involved in this case, namely, the legal effect of a failure to remove timber, the Federal Courts follow the rule of law of the state where the timber exists. *Thomas v. Gates,* (C.C.A. 4, 1929), 31 Fed. 2d 828 (Cert. denied October 14, 1929, 280 U. S. 259).

The District Court, however, held that a Federal grant of timber stands upon a different plane.

We acknowledge the existence of the rule to the effect that whenever the question in any Court, State or Federal, is whether a title which was once the property of the United States has passed, that question must be solved by the laws of the United States. *United States v. Oregon,* 295 U. S. 1, 79 L. Ed. 1267.

However, we contend that rule does not apply where the United States has admittedly parted with title and has made an outright grant of specific real property.

> "Federal law controls in the disposition of land of the United States and the question whether title to land has passed from the United States must be determined by Federal law . . . But lands, title to which has passed from the United States, in general stand as any other property within the State."
>
> 73 C.J.S. 67;
>
> *State v. Baschelder,* 5 Minn. 223, 80 Am. D. 410.

In *United States v. Oregon,* 295 U. S. 1, 79 L. Ed. 1267, the specific question is whether lands located

between the high and low water marks, and adjoining uplands granted by the United States could be declared by a State Legislature to belong to the State, and approaching this question the Court acknowledges the rule for which we contend when it says at page 28:

> "In construing a conveyance by the United States of land within a state the settled and reasonable rule of construction of the state affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted. But no such question is presented here, for there is no basis for implying any intention to convey title to the State.
>
> The State in making its present contention does not claim as a grantee designated or named in any grant of the United States."

The Act of 1862 constituted a grant in praesenti, did not require the issuance of a patent, and accomplished a complete divesting of the title of the United States. *Missouri Valley Land Co. v. Wiese,* 208 U. S. 234, 2 L. Ed. 466; *Deseret Salt Co. v. Tarpe,* 142 U.S. 242, 35 L. Ed. 999.

The basic rule was expressed in *Hardin v. Jordan,* 140 U. S. 371, 35 L. Ed. 428, where the Court says:

> "In our judgment the grants of the Government for lands bounded on streams and other waters without any reservation or restriction of terms are to be construed as to their effect according to the law of the State in which the lands lie."

And in *United States v. Oklahoma Gas and Electric* Co., 318 U. S. 206, 87 L. Ed. 716, the rule is stated:

> "A conveyance by the United States of lands which it owns beneficially . . . is to be construed in the absence of any contrary indication according to the law of the state where the land lies."

The same principle is applied in *U. S. v. Illinois Central R. R.,* 154 U. S. 225, 38 L. Ed. 971.

A grant of California land to the United States is to be construed by California law. *Los Angeles and Salt Lake R. Co. v. U. S.,* 140 Fed. 2d 436, cert. denied 32 U. S. 757, 88 L. Ed. 1586.

In *Reconstruction Finance Corporation v. Beaver County,* 328 U. S. 204, 90 L. Ed. 1172, the Court says at page 210:

> "We think the Congressional purpose can best be accomplished by application of settled state rules as to what 'constitutes real property' *so long as it is plain as it is here that the State rules do not effect a discrimination against the Government* or patently run counter to the terms of the Act" (Italics supplied)

We are not unmindful of the doctrine expressed in such cases as *Clearfield Trust Co. v. United States,* 318 U. S. 363, 87 L. Ed. 838, to the effect that the application of State law is denied where it would make identical transactions subject to different laws of different states. That principle has not been and should not be applied to destroy recognized titles to real property.

The proper rule is that if the United States has admittedly granted property, and Congress has mani-

fested no intention that the grant is to be construed other than by State law and the State law does not effect a discrimination against the government, then the rights which attach to the grant should be determined by reference to State law as a guide.

There is no evidence existent that Congress in 1862 intended the application of any law other than the law of California.

The Pacific Railway was constructed in Nebraska, Wyoming, Utah, Nevada and California.[4] Of these, California alone was a state in the year 1862. In fact, Congress expressed some concern over the policy involved in granting land in one state only for the purpose of construction of a trans-continental railroad.

Typical of this view is the statement of Pugh of Ohio in a speech in support of an amendment which he offered to the pending bill to the effect that its provisions should apply to a road to the Eastern boundary of California instead of to San Francisco:

> "I do not think the Government of the United States can justify itself for building a railroad in a state. It was very good Democratic doctrine in the days of Jackson and Madison that we could not do so. I am willing to aid in building this road through the territories, but I will no more vote to build it in the State of California than I will in the State of Missouri."[5]

Under the circumstances there is no persuasive evidence that Congress intended that any law other than

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[4]Sabin, Building the Pacific Railway.

[5]Globe, 35th Congress, Second Session, page 420.

the law of California should be applicable to this grant.

IV. THE DOCTRINE OF ESTOPPEL IS NOT APPLICABLE.

The complaint alleges the defendant is estopped to assert any ownership in the timber in view of its "failure to assert title at any time prior to 1958 and because it permitted the sale of the timber without objection, to the detriment of the government." (R. 3).

The District Court concluded (R. 87) that appellant was estopped by reason of

> "its failure and the failure of its predecessors in title to claim ownership of or to assert any interest in the timber for at least 30 years prior to 1958, during which time the plaintiff administered the property as its own and twice included the timber in timber sales."

The doctrine of estoppel cannot be applied to defeat a vested title to real property. The owner of real property loses his title only by grant or by adverse possession.

> "As to real property, the general rule is that where the state has passed a perfect legal title, the doctrine of abandonment is not applicable thereto and that the title vested in the grantee cannot be affected or transferred by his act in departing from the dominion over it."
>
> 1 Am. Jur. 5.

> "Clearly, inaction or indifference of a fee owner will not divest his title. Disclaimer of freehold can only be by deed or in Court of record.

> One cannot divest himself of title to land by mere declaration that he does not own or claim any of it, and a vested title to land cannot be lost by oral admission that it is the land of another."
>
> 73 C.J.S. page 208.

In *East Tennessee Iron and Coal Co. v. Wiggin,* 68 Fed. 446, 449, the Court states the principle:

> "Precisely what is meant by an abandoned legal title is hard to define. If it is a valid legal title, it is inconceivable how it can be abandoned . . . McCoy's (the grantee's) disappearance and long neglect to assert the title which appellants claim he acquired by his adverse possession did not operate to extinguish or toll it; nothing but a possession adverse to him would have such a consequence. Plaintiffs did not abandon their title by neglecting for forty years to take possession or bring action."

The facts themselves do not warrant the conclusion that appellant is estopped. The District Court relied upon the following facts:

1. The failure of appellant and its predecessors to "assert any interest" in the timber.

2. The administration of Section 15 by the Forest Service.

3. An attempt, by the government, in 1937 to sell the timber. (R. 83).

4. The 1954 sale of the timber.

The failure of appellant and its predecessors to assert any interest in the timber is not persuasive. An

owner of real property is not required to affirmatively assert any interest in order to maintain his title.

The administration of Section 15 by the Forest Service is not a hostile act which is adverse to appellant's ownership of the timber. The United States has, ever since 1925, when the mineral character of Section 15 was conclusively established, been the acknowledged owner of the surface and it therefore would be expected to administer the property as its own. The Forest Service administered Section 23 (the Waldon timber) in the same fashion as it administered Section 15.

The 1937 attempt to sell the Section 15 timber is not in any way adverse to appellant's title. As revealed by the District Court's Finding Number 12 (R. 83) the sale was made to a stranger to the title and there is absolutely no evidence other than the publication of one general notice in a Nevada County newspaper that this attempt to sell was ever communicated in any manner to appellant's predecessor in title despite the fact that the identity of the timber owner was at all times ascertainable from the public records.[6] Once again, the 1937 sale also covered the Waldron timber and was not found to be persuasive in the *Waldron* case.

With respect to the 1954 sale appellant learned of the sale and commenced to actively assert its title to

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[6]The Supreme Court has recently held that this kind of notice does not measure up to due process requirements. *Schroeder v. New York*, decided Dec. 17, 1962. 9 L. Ed. 255.

the timber before the expiration of the period of time which would deprive appellant of its title by adverse possession.

Further, of course, inherent in the District Court's imposition of an estoppel is an implied finding that the United States relied in some manner to its detriment upon the inaction of appellant. It is painfully apparent there was no such reliance. Ever since the acquisition of title by The Central Pacific Railroad, the ownership of the timber by the railroad and its successors has been readily apparent from an examination of the official records of the County Recorder of Nevada County. Notwithstanding this fact, the government has never demanded of the record owner that the timber be removed nor has it ever given any notice to the record owner of its intention to sell. Furthermore, following the decision in *United States v. Waldron,* the government permitted State Box Company and other owners of timber with identical title history to cut and remove it. (R. 35, 86). But, although after the *Waldron* decision State Box Company apparently would have been permitted to cut and remove the timber on Section 15 had it requested permission (R. Vol. II 35), since in ignorance of its ownership it failed to request such permission, it was thereby completely divested of its title. This is indeed a strange application of the doctrine of estoppel.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order be reversed and the cause remanded with instructions to enter an order declaring that appellant was the owner of the timber removed and is the owner of the timber now standing on Section 15.

Dated, Sacramento, California,
February 1, 1963.

HAROLD T. KING,
Attorney for Appellant.

I certify that, in connection with preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion the foregoing brief is in full compliance with those rules.

HAROLD T. KING,
Attorney for Appellant.

(Appendix Follows)

Appendix.

Appendix

In the United States District Court
for the Northern District of
California, Northern Division

No. 6105

United States of America
Plaintiff,

vs.

P. S. Waldron, Margaret A. Waldron, State Box Company, a corporation, and Tahoe Sugar Pine Company, a corporation,
Defendants.

ORDER

I will find that the defendants P. S. Waldron and Margaret A. Waldron are the successors in interest to the Central Pacific Railroad Co. and the owners of the timber in question, subject to the rights of the State Box Company as to which as between the defendants there is no dispute; that as between the parties to this action the plaintiff is the owner of the fee of the land upon which the timber stands, subject to the right of the Waldrons to remove the timber.

The rule in the case of Gibbs v. Peterson, 163 Cal. 758, will be applied. Defendants shall have until November 1, 1950 within which to remove the timber and, if they do not remove the same within that time, plaintiff may remove and sell the same at the expense and for the benefit of the defendants, accounting to the defendants for the net proceeds thereof; if the timber be not removed within that period, plaintiff will be entitled to retain from the proceeds of the sale of the timber such amount as will reasonably compensate plaintiff for the loss of use and occupancy of the land for the period following November 1, 1950 to the time of the actual removal, such amount to be determined by the court. An interlocutory decree will be entered accordingly. Findings of fact to be prepared by the defendants.

Dated October 26, 1949.

Dal M. Lemmon
United States District Judge

Endorsed: Filed Oct. 26, 1949.
C. W. Calbreath, Clerk.

[Title of Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the court without a jury on May 5th, 1949, Emmet J. Seawell, appearing for plaintiff and Messrs. Edward D. Landels, Sumner Mering and Robert M. Searls appearing for defendants. Both oral and documentary evidence was received and the cause submitted for decision. The court herewith makes the following findings of fact and conclusions of law:

Findings of Fact

The court hereby finds as follows:

I.

That by the Act of Congress of July 1st, 1862, United States of America granted to the Central Pacific Railroad Company all of the timber located upon the lands described in the complaint herein; that defendants P. S. Waldron and Margaret A. Waldron acquired all of the title and interest of the Central Pacific Railroad Company in and to said timber and in 1945 entered into a contract of sale of said timber with defendant State Box Company, a corporation.

II.

That it is not true that defendants or their predessors in interest failed to cut and remove the timber on the lands described in the complaint within a reasonable time after the grant thereof by plaintiff.

III.

That it is not true that defendants or their predessors in interest failed to cut and remove the timber on the lands described in the complaint within a reasonable time after they had reason to believe that said lands were mineral in character.

IV.

That at no time prior to the year when defendants began to cut the timber on said lands was it commercially feasible to cut and remove the same.

V.

That prior to the time when the new road was built between Highway 20 and the Town of Washington in 1944, the timber on said lands could not have been cut and delivered to the market and sold for a price sufficient to cover the cost of felling, hauling and milling the same.

VI.

That it is true that the defendants did begin to cut said timber within a reasonable time and continued cutting until ordered by plaintiff to desist.

VII.

That until November 1st, 1950, is a reasonable time within which to allow defendants to cut and remove said timber.

Conclusions of Law

As Conclusions of Law from the foregoing facts the court finds:

I.

That as between the parties hereto, defendants P. S. Waldron and Margaret A. Waldron are the owners of the timber located upon the property described in the complaint herein, subject to the rights of defendant, State Box Company, under a contract of purchase between said defendants P. S. Waldron and Margaret A. Waldron and said defendant State Box Company.

II.

That as between the parties hereto, plaintiff United States of America is the owner of the fee title to the lands described in the complaint herein, subject to the rights of defendants to remove the timber located thereon.

III.

That if defendants fail to remove said timber within a reasonable time, which is hereby fixed by the court as some time before November 1st, 1950, plaintiff has the right and is entitled to cut and remove the timber and sell the same at the expense and for the benefit of defendants, accounting to the defendants for the net proceeds thereof.

IV.

That if defendants fail to remove the timber from said lands within the time hereby fixed by the court plaintiff will be entitled to retain from the proceeds of the sale of the timber such amount as will reasonably compensate plaintiff for the use and occupancy of said lands for the period following the period

from November 1st, 1950 to the time of the actual removal of said timber.

V.

An interlocutory decree is hereby ordered to be entered in accordance herewith.

Dated: ————————, 1949.

Dal M. Lemmon
United States District Judge

[Title of Court and Cause]

INTERLOCUTORY DECREE

This cause having come on regularly for trial without a jury and this court having this day made its Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed as follows:

That defendants P. S. Waldron and Margaret A. Waldron are the successors in interest of the Central Pacific Railroad Company and are the owners of timber on the following described lands:

> Lots 12, 14 and 15 and the NW¼ of the NE¼ of Section 21, Township 18 N., Range 11 E., M.D.B. &M. in Nevada County, California

subject to the rights of defendant State Box Company under a contract of purchase entered into between it and said defendants, P. S. Waldron and Margaret A. Waldron; and that the United States of America, as between the parties to this action, is the owner of the fee title to said lands subject to the right of the defendants to remove the timber standing thereon.

That defendants are allowed until November 1st, 1950 within which to remove the timber located upon the above described lands and that if they do not remove the same within said time, plaintiff United States of America is authorized to remove and sell the same at the expense of and for the benefit of defendants, accounting to the defendants for the net proceeds thereof and if said timber is not removed within the period herein provided, plaintiff United States of America is entitled to retain from the pro-

ceeds of the sale of said timber, such amount as will reasonable compensate it for the loss of use and occupancy of said land for the period between November 1st, 1950 to the time of the actual removal of said timber, such amount to be hereafter determined by the court in appropriate proceedings, reserving to the court the power to extend the time allowed for the removal of the timber should defendants be prevented from removing the same by an order staying the judgment pending an appeal.

Dated: November 21st, 1949.

Dal M. Lemmon
United States District Judge

Approved as to form:
Emmet J. Seawell
Attorney for Plaintiff

Endorsed: Filed Nov. 21, 1949.
C. W. Calbreath, Clerk.

[Title of Court and Cause]

AMENDED ORDER

I will find that the defendants P. S. Waldron and Margaret A. Waldron are the successors in interest to the Central Pacific Railroad Co. and the owners of the timber in question, subject to the rights of the State Box Company as to which as between the defendants there is no dispute; that as between the parties to this action the plaintiff is the owner of the fee of the land upon which the timber stands, subject to the right of the Waldrons to remove the timber.

The defendants shall have until November 1, 1951 to exercise their right to remove that timber which was growing on the land in question at the time of the grant and on which cutting rights have not been exercised. An interlocutory decree will be entered accordingly. Findings of fact to be prepared by the defendants.

Dated, January 20, 1950.

Dal M. Lemmon
United States District Judge

[Title of Court and Cause]

STIPULATIONS

It is stipulated by the parties hereto that upon motion duly made by the plaintiff, an Amended Findings of Fact, Conclusions of Law, Order, and an Interlocutory Decree, may be made and entered by the court wherein timber is defined and the rights of the parties are more specifically determined.

Plaintiff hereby agrees and stipulates that in consideration of the above it will not appeal from the Amended Interlocutory Decree entered herein provided that if the said Amended Findings of Fact, Conclusions of Law, Order, and Interlocutory Decree are not made by the court, this stipulation will not be binding upon the parties herein.

Dated this 20th day of January, 1950.

Sumner Mering
Edward Landels
Robert Searls
Attorneys for Defendants

Assistant U. S. Attorney
Emmet J. Seawell
Attorney for Plaintiff

[Title of Court and Cause]

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the court without a jury on May 5, 1949, Emmet J. Seawell, appearing for plaintiff and Messrs. Edward D. Landels, Sumner Mering and Robert W. Searls appearing for defendants. Both oral and documentary evidence was received and the cause submitted for decision. An order was made by the court and an interlocutory decree entered. Subsequently a motion was duly made to open, modify and clarify such interlocutory decree. The court herewith makes the following amended findings of fact and conclusions of law:

Findings of Fact

The court hereby finds as follows:

I

That by the Act of Congress of July 1, 1862, United States of America granted to the Central Pacific Railroad Company all of the timber located upon the lands described in the complaint herein; that defendants P. S. Waldron, Margaret A. Waldron acquired all of the title and interest of the Central Pacific Railroad Company in and to said timber and in 1945 entered into a contract of sale of said timber with defendant State Box Company, a corporation.

II

That the timber subject to this decree is all that timber which was growing on the land in question at the time of the grant and on which cutting rights

have not been exercised, which is determined to be all timber of 22 inches or more largest measure diameter breast high.

III

That it is not true that defendants or their predecessors in interest failed to cut and remove the timber on the lands described in the complaint within a reasonable time after the grant thereof by plaintiff.

IV

That it is not true that defendants or their predecessors in interest failed to cut and remove the timber on the lands described in the complaint within a reasonable time after they had reason to believe that said lands were mineral in character.

V

That at no time prior to the year when defendants began to cut the timber on said lands was it commercially feasible to cut and remove the same.

VI

That prior to the time when the new road was built between Highway 20 and the Town of Washington in 1944, the timber on said lands could not have been cut and delivered to the market and sold for a price sufficient to cover the cost of felling, hauling and milling the same.

VII

That it is true that the defendants did begin to cut said timber within a reasonable time and continued cutting until ordered by plaintiff to desist.

VIII

That until November 1, 1951, is a reasonable time within which to allow defendants to cut and remove said timber.

Conclusions of Law

As Conclusions of Law from the foregoing facts the court finds:

I

That as between the parties hereto, defendants P. S. Waldron and Margaret A. Waldron are the owners of the timber as defined in the complaint herein, subject to the rights of defendant, State Box Company, under a contract of purchase between said defendants P. S. Waldron and Margaret A. Waldron and said defendant State Box Company.

II

That as between the parties hereto, plaintiff United States of America is the owner of the fee title to the lands described in the complaint herein, subject to the rights of defendants to remove the said timber located thereon.

III

That the defendant shall have as a reasonable time until November 1, 1951 to exercise their right to remove the said timber.

IV

An interlocutory decree is hereby ordered to be entered in accordance herewith.

Dated this 20th day of January, 1950.

Dal M. Lemmon
United States District Judge

[Title of Court and Cause]

AMENDED INTERLOCUTORY DECREE

This cause having come on regularly for trial without a jury and this court having this day made its Amended Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed as follows:

That defendants P. S. Waldron and Margaret A. Waldron are the successors in interest of the Central Pacific Railroad Company and are the owners of the timber on the following described lands:

> Lots 12, 14 and 15 and the NW¼ of the NE¼ of Section 21, Township 18 N., Range 11 E., M.D.B.&M. in Nevada County, California

subject to the rights of defendant State Box Company under a contract of purchase entered into between it and said defendants, P. S. Waldron and Margaret A. Waldron; and that the United States of America, as between the parties to this action, is the owner of the fee title to said lands subject to the right of the defendants to remove the timber standing thereon.

That defendants shall have until November 1, 1951 to exercise their right to remove that timber which was growing on the land in question at the time of the grant and on which cutting rights have not been exercised, which is determined to be all timber of twenty-two (22) inches or more largest measure diameter breast high.

The court reserves the power to extend the time allowed for the removal of said timber should defend-

ants be prevented from removing the same by an order staying the judgment pending an appeal.

Dated January 20, 1950.

Dal M. Lemmon
United States District Judge